

1 IN THE UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF MARYLAND

3 MARY E. EDMONDSON,)
4 et al.,)
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9 May 15, 2020
10 Transcript of Proceedings
11 Teleconference

12 BEFORE: The Honorable STEPHANIE A. GALLAGHER, Judge

13 For the Plaintiffs:

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16 Smith, Gildea & Schmidt, LLC

17 TIMOTHY F. MALONEY, Esquire
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P R O C E E D I N G S

THE COURT: Good morning, everyone. This is Judge Gallagher and I understand we have everyone on the line.

We are here today in the case of Mary Edmondson versus Eagle National Bank, case number SAG-16-3938. Let me ask at the outset if everyone could put their phones on mute if you're not actively participating. I think that would limit the amount of feedback we're hearing. Okay, thank you.

Now if I could have the lawyer for the parties introduce themselves, starting with the Plaintiffs and tell us who is on the line for your side.

MR. SMITH: Your Honor, it's Michael Smith and Tim
Maloney and Melissa English, on behalf of the Plaintiffs.

THE COURT: All right, and who do we have for the Defendants?

MR. BECKER: Good morning, Your Honor. Ryan Becker, with Brian Moffet and Michael Brown for all of the Defendants.

THE COURT: Thank you. And I once again would ask that people put their phones on mute. I am hearing a little bit of feedback from somebody's phone.

Okay, for the hearing today, we will proceed by having argument from the Plaintiffs, then from the Defendants, and then again from the Plaintiffs in rebuttal. What I am going to do is to reserve my questions until Counsel has finished speaking to avoid people from interrupting one

1 another during a phone hearing. So I will allow Counsel to
2 finish their presentation and will reserve my questions for
3 the end. So why don't we start from hearing from Plaintiffs'
4 counsel.

5 **MR. SMITH:** Yes, Your Honor. Michael Smith. I'll
6 start for the Plaintiffs and then Tim Maloney will add on his
7 topics.

8 By way of background, Genuine Title was owned by Jay
9 Zuckerberg. He started the company in approximately 2005 and
10 at the beginning he had come from another title company,
11 Heavyweight Title and he started Genuine Title and he started
12 paying kickbacks as part of his business plan in order to
13 generate business.

14 By 2008, Jay Zuckerberg admits that more than
15 50 percent of Genuine Title's business is supported by
16 kickbacks. He identifies two types of targets for business,
17 big banks and at big banks he targets loan officers
18 specifically and at regional and smaller banks he targets
19 branch managers, because they're the ones who control where
20 the title services went.

21 Eagle is a regional bank and mortgage company during
22 the time that's at issue. From 2007 to 2012 Genuine Title
23 paid kickbacks to Eagle through its branch managers.

24 There are two main people at Genuine Title who
25 generate business. It's Jay Zuckerberg and Brandon Glickstein.

1 Jay throughout his time at Genuine Title and he's the owner of
2 Genuine Title, was a money guy. And by "money guy" I mean he
3 paid cash or checks to the branch managers and/or loan
4 officers in order to get the business. Brandon Glickstein
5 starts out as a money guy at Genuine Title, but then switches
6 approximately in 2009 or 2010 he switches to doing marketing.
7 And what he would do is have Genuine Title pay the brokers'
8 bills for marketing via what he calls credits. But what he
9 would do is instead of paying somebody \$200 per referral, he
10 would get Genuine Title to pay \$200 to Competitive Advantage
11 Marketing for marketing materials that he was supplying to the
12 referred. So in those cases they would be characterized in
13 our complaint as marketing credits, but what it was was it was
14 cash that was paid by Genuine Title to CAM to pay the bills of
15 the branch managers or the loan officers as the case may be.

16 During the time period that is the subject of this
17 case, kickbacks Jay Zukerberg testifies both at the Maryland
18 Insurance Administration and in a related case, Emery, that
19 kickbacks is a problem within the Maryland market and Jay
20 Zukerberg says this is what he had to do to compete. He would
21 have preferred to compete by lowering prices, but kickbacks
22 are what it took with companies he was dealing with. He
23 testified explicitly what he means by that is he would have
24 been happy to pass on these kickbacks onto the borrowers as
25 savings, but the branch managers at Eagle and other places

1 wanted the money for themselves.

2 During the period of time identified in the Class,
3 we have identified 3,472 loans through the information we have
4 obtained from the Genuine Title settlement database. We
5 exported that to an Excel spreadsheet and we have been able to
6 identify these loans because these loans have settlement dates
7 in the database which based on our past experience makes them
8 likely to have closed.

9 With respect to these loans, one thing that is
10 telling is that a whopping 68 percent of these loans come from
11 Gary Klopp's branch at Eagle. We know this because the
12 referring branches appealed in the Genuine Title database.

13 Jay Zukerberg tells us via affidavit that he started
14 paying Gary Klopp in 2005 or 2006 between \$300 and \$400 per
15 loan. We have identified and had Mr. Zukerberg authenticate
16 \$340,000 in checks to Gary Klopp during the applicable period.
17 Since then we've identified an additional \$119,000 in checks.

18 With respect to other branches, 8 percent of the
19 loans, 8 percent of those 3,472 loans comes from Adam
20 Mandelberg's branch. Adam Mandelberg has testified -- he has
21 been deposed. Mr. Mandelberg took the Fifth when being asked
22 about taking kickbacks while at Eagle. We know from Jay,
23 however, that Genuine Title was paying kickbacks throughout
24 Adam's time at Eagle at a minimum of \$300 per referral. How
25 it would work would be -- Jay Zukerberg has described how it

1 works on a monthly basis. He would run the totals at the end
2 of each month or since the last payment, but it was generally
3 monthly. He would cut the check the following month to the
4 LLC that had been set up to run the kickbacks through.

5 Some of the players -- other players, Jim Kniest who
6 was a branch manager at Eagle, got money in the beginning and
7 then marketing credits through Brandon Glickstein. And
8 Brandon has testified to that in that the fact that kickbacks
9 were paid throughout Jim Kniest's time at Eagle on all of Jim
10 Kniest loans referred.

11 Klimchak was another branch that Brandon managed and
12 he also has testified that his branch received kickbacks for
13 each referral throughout his time at Eagle. Jay Zukerberg
14 testifies and tells us that the branch managers set up the
15 LLCs to receive the kickbacks because they, quote, "did not
16 want it to look fishy." End quote. In fact, the names of the
17 LLCs that were chosen were either related to, quote,
18 "consulting companies or something that sounded like a normal
19 vendor for a title company." In Mr. Klopp's case, he had
20 three LLCs that he ran through kickbacks from Genuine Title.
21 They are Carroll Abstracts, All County Settlements and
22 Columbian Network Associates. Mr. Klopp was getting so much
23 money that he needed three LLCs to funnel this money through
24 and then he used -- he didn't use marketing materials, he used
25 this money to purchase live leads to generate business for

1 Eagle National and Eagle Nationwide. It is on this factual
2 backdrop that we move for Class certification. All
3 individuals in the U.S. with regards on federally-related
4 mortgage as defined under RESPA from brokers who were
5 originated by Eagle Bank or Eagle Nationwide Mortgage for
6 which Genuine Title provided a settlement service as
7 identified in Section 1100 on the HUD-1 between January 1,
8 2007, and December 31, 2011. Exempted from this class is any
9 person who during the period of January 1, 2007, to
10 December 31, 2011, was an employee, officer, member and/or
11 agent of the Defendants, Eagle National Bank, Eagle Nationwide
12 Mortgage, ESSA Bank and Trust, Genuine Title LLC, Brandon
13 Glickstein, Inc., and/or Competitive Advantage Media Group,
14 LLC.

15 With respect to ascertainability, the Rule 23
16 factors ascertainability has been identified as an additional
17 consideration. We have the Genuine Title database with the
18 addresses, telephone numbers, et cetera. The database tells
19 us what loans had settlement dates. Eagle also has loan files
20 including HUD-1s to identify this class.

21 With respect to numerosity, Your Honor, there are
22 3,472 loans with settlement dates. This Circuit has approved
23 cases with as little as 40 members. Numerosity is satisfied.

24 With respect to commonality, and commonality does
25 not require all or even most issues to be common, but here,

1 we're talking about Mary Edmondson or frankly, Barry or
2 Harriet homeowner, the questions and the evidence are going to
3 be the same.

4 Jay Zukerberg will testify, did you pay a kickback
5 for every loan referred or sent by these Eagle branches,
6 Klopp, Mandelberg, et cetera? And the answer will be yes.
7 How much did you pay for each loan between X and Y? And it
8 will vary based upon the branch that's being discussed. How
9 often would you pay for loans? And he will testify, I would
10 tally up the settlements since the last kickback, normally
11 monthly, and cut them a check for the agreed-upon amount.

12 With respect to fraudulent concealment, these issues
13 are common as well. When the CFPB and the Maryland Insurance
14 Administration were closing in on you, Mr. Zukerberg, did you
15 create and backdate sham title services agreement to try and
16 conceal the kickbacks from regulators? The answer will be a
17 candid yes. Didn't Mr. Klopp and Mr. Mandelberg sign these
18 backdated title services agreement? And this is 76 percent of
19 the loans that Eagle has. The answer will be yes. These
20 folks did. Did these Eagle folks form LLCs to receive
21 kickbacks to conceal the kickbacks so that it would not look
22 fishy? His answer will be yes. Did you pay those LLCs for
23 the referrals? Yes. Did you and Eagle choose not to put the
24 referral fees on the HUD-1s? Yes. Is that every HUD-1? Yes.
25 Were the kickbacks disclosed in the good faith estimate? His

1 answer will be no. And is that true for all of the loans
2 referred by Eagle? Yes. Were barters ever told of the
3 referral fees? He will say that they were not, and so on and
4 so on. All the things that we have alleged for concealment
5 will be testified to on a Class-wide basis.

6 The same basic questions will be asked of Brandon
7 Glickstein, Gary Klopp and if Mr. Mandelberg doesn't take the
8 Fifth, Mr. Mandelberg and others. The evidence will come in
9 on a class-wide basis because, Judge, frankly that is how the
10 witnesses actually remember it. Unlike other cases, Jay
11 Zuckerberg does not remember Mary Edmondson or Chemene Clark's
12 settlement or Harry or Harriet Homeowner, a member of the
13 punitive class. What he does remember was they did the same
14 thing time and time again and it happened throughout the time
15 that these folks were at Eagle.

16 When you're getting 3,500 to 4,000 loans from one
17 institution and 68 percent from one person's branch, you
18 remember what that deal was. And you remember that it
19 occurred all the time.

20 As for damages, this is common as well. It is the
21 same formula for each set of borrowers. The only thing that
22 would change is the amount based on what they've paid. This
23 has never been an issue -- calculating damages has never been
24 an issue in the tens of thousands of borrowers that have been
25 helped throughout these RESPA actions that we have had.

1 With respect to typicality, claims arise or defense
2 arise from the same conduct and whether the same legal theory
3 underlies the claim or defenses. Here, they're all RESPA
4 claims. They're all for kickbacks. They're out of each
5 settlement and they all involve fraudulent concealment and
6 specifically the testimony will be in bulk. It will not be
7 specific as to a specific person because that's not how the
8 witnesses remember it. They remember it from they did the
9 same thing every time, all the time and the facts are Class
10 wide.

11 We'll talk about it more later, but the defense all
12 involves the jury's consideration of the same evidence that is
13 applicable to all the claims on the issue of fraudulent
14 concealment. Uniformity in the way that it was concealed is
15 what the testimony will be. The defense's proof of what was
16 available out there in the universe. The arguments that they
17 made before the Fourth Circuit. They all apply -- those
18 arguments apply to the reasonable residential borrower test as
19 set out in *Edmondson*. And this uniformity in the way that
20 they concealed, uniformity in what was available in the
21 universe can all be weighed by the jury to determine whether
22 diligence required the reasonable residential borrower to find
23 such evidence. And what that evidence would mean, even if
24 they found it.

25 It is an objective standard for the jury to

1 determine, does due diligence require a reasonable residential
2 borrower to search info that the defense relies on at or about
3 the time that it is available to be found. In this case, that
4 evidence will be that -- the evidence that they point to isn't
5 even available on the internet until between five and
6 eight years, depending upon when you settle in our class after
7 your settlement.

8 Your Honor, as Judge Bennett said in *Fangman*, when
9 approving the class action certification of the class as to
10 West Town, this is all subject to class-wide proof. And he
11 cited in part, a HUD regulation 12 CFR 1024 regarding the use
12 of pattern and practice to prove the broader scheme.

13 Mrs. Edmondson -- on the issue of typicality, Ms.
14 Edmondson's falls into the pattern and practice that Jay
15 Zuckerberg testified to. She settles on August the 10th, 2010
16 and the kickback check is issued for the Mandelberg branch
17 referral on September 2, 2010.

18 With respect to adequacy, the representative
19 plaintiffs have provided documents, answered discovery, sat
20 for their depos. Ms. Edmondson drove up from North Carolina
21 for her depo. She was scheduled to be on the phone now. I
22 did not hear her announce, but I don't know whether that was
23 part of the process. Ms. Clark would be here, but she's a
24 nurse and has been working countless hours in the hospital
25 through this pandemic.

1 With respect to the adequacy of counsel, counsel has
2 been approved as class counsel in a number of these RESPA
3 class action cases, and no Court has ever failed to determine
4 that we were at the very least, adequate.

5 With respect to Rule 23(b), common questions
6 predominate. When going through the common amount issues I
7 went through this analysis. It is effectively the same issues
8 as commonality, but with the added requirement that these
9 common issues predominate the individual ones. Was there a
10 (audio distortion) source of conduct? Yes. Is the testimony
11 going to be on a class-wide basis? Yes. How are we going to
12 prove it? Through the principals who were involved and the
13 documents that were found on a class-wide basis. Was RESPA
14 violated in the same manner? Yes. Are the common issues the
15 heart of this matter? And I would say yes, that's what the
16 predominance is all about. We are going to be able to put on
17 one witness, one time who is going to testify to the scheme,
18 the fraudulent concealment in one fell swoop. And the
19 violations were concealed in the same manner.

20 Superiority. With respect to superiority, discovery
21 is the same. The testimony is the same. The issues are the
22 same. The measures are the same and doing this up to 3,400
23 times as opposed to one time is what predominance and
24 superiority are all about.

25 Now with respect to the Defendant's arguments on the

1 issue of predominance, they cite diligence, the first prong
2 for fraudulent concealment. I contend that these are actually
3 common issues. How it was concealed in the first place is the
4 same in each instance. And Jay Zukerberg and Brandon
5 Glickstein are going to testify to that. It was never put on
6 HUD-1s, it was never put in GFEs. The payments were always
7 made through Sham LLCs and/or CAM and Marketing Creditor. The
8 borrowers were never told. There was backdated title services
9 agreements involved both as to Gary Klopp and Adam Mandelberg
10 accounting for 76 percent of this class. The jury will
11 evaluate this evidence and determine whether a reasonable, due
12 diligent residential borrower would investigate.

13 With respect to the information that is available on
14 the internet that Defendants cite to, the information is the
15 same for all Plaintiffs. It is uniform. They're a Government
16 press release and the importance of it certainly we disagree
17 on, but the fact that there were Government for absolute
18 leases, the fact that there was a court case that somebody
19 went through Pacer. The media is the media that they have
20 identified and can be found where they say that it can be
21 found many years after the entire class had settled its loans
22 and the jury evaluates their argument whether diligence
23 requires a reasonable residential borrower per the Court of
24 Appeals in *Edmondson* with a settlement that involved common
25 concealments as described above to scour the internet many

1 years after their settlement for info as to whether the bank
2 that did your loan was doing something wrong at the time of
3 your loan some five to eight years prior. This issue is
4 common for the entire class and can be evaluated as such. I
5 can't imagine jurors buying the argument that diligence
6 requires a reasonable residential borrower every day or once a
7 month for up to eight years to do a LexisNexis search as the
8 Defendant's counsel did to see whether there was any
9 wrongdoing involved with their bank and apply the reasonable
10 residential borrower's test. But if they get past the Motion
11 for Summary Judgment by Plaintiffs on that issue, that would
12 be common proof for the jury to evaluate.

13 What the Defendants may be really saying here is
14 just maybe, maybe a borrower just happened to be reading the
15 Baltimore Sun or the Washington Post on Friday, January the
16 23, 2015 and read the entire paper. And found on page A-12
17 and A-14 respectfully and saw that Wells Fargo and Chase had
18 settled with the CFPB. There's nothing in that article about
19 Eagle or any of its employees or the article on Friday,
20 February the 5th, 2016 in the Baltimore Sun on the Wells Fargo
21 settlement with its borrowers where there's no mention of
22 Eagle or any of its employees, or the article on Thursday,
23 April the 30th, 2015 with Genuine Title's employees and other
24 mortgage brokers including Klopp and Mandelberg reaching an
25 agreement with the CFPB. All these articles are buried in the

1 paper and none of them include Eagle. This is a lot to do
2 about nothing. 87 percent, Your Honor, of the loans out of
3 3,472, 87 percent of the loans are outside the state of
4 Maryland. 94 percent of those loans are outside the state of
5 Virginia. So an article in the Baltimore Sun or the
6 Washington Post would mean nothing to those folks. All these
7 articles appear on a weekday. The subscribers to the
8 Baltimore Sun, Maryland subscribers to the Baltimore Sun only
9 represent 2 percent of all Marylanders. What that means out
10 of the Maryland loans, on average, if 2 percent subscribe to
11 the Baltimore Sun, nine borrowers would even have the
12 subscription to the Sun. This is not attempting to find the
13 needle in the haystack. This is the defendants trying to find
14 a needle in the fields where the hate is grown. And guess
15 what? There's likely no needle there. None of these
16 borrowers were combing the papers for five to eight years to
17 find an article on page A-12 that does not mention their bank
18 and then figure out that their bank took a kickback five to
19 eight years prior. 87 percent of the loans are outside of
20 Maryland. As the Court pointed out in -- the Court of Appeals
21 pointed out in *Edmondson*, notice of one wrong by Defendant
22 does not necessarily trigger a duty for potential Plaintiffs
23 to investigate other potential wrongs the Defendant might be
24 committing. To say the proverbial needle predominates all the
25 common issues that I've gone over in this case is contrary to

1 the idea of what predominance means, to be the strongest or
2 main element.

3 The Defendants' citations of *Thorn* is nothing like
4 what is found in this case. *Thorn* involved somebody trying to
5 certify a class over I think it was 67 years from 1911 to
6 1974, that a white-owned insurance company had been
7 discriminating against African Americans or blacks. And the
8 evidence in that case was that there were churches that were
9 preaching about this problem. There were black-owned
10 insurance companies formed and part of their marketing was to
11 tell the African American community that they were being taken
12 advantage and it was a class of I think 1.4 million people
13 with respect to that. That case was not on point with this
14 case.

15 The other argument that Defendants make is the
16 exemptions on RESPA loans create individualized issues and
17 those individualized issues predominate. They are the
18 strongest or main element of this case. Of the 3,472 Eagle
19 class loans, 1,385 are identified as VA refinance loans,
20 commonly known as VAIRRL. These loans may only refinance an
21 existing VA loan and a VA loan cannot be made for an
22 investment purpose. It may only be made for primary
23 residential purposes and we cite the VA guidelines with
24 respect to that.

25 Cash out is available in very limited circumstances

1 and only to clear a lien against the property secured by VA
2 loans. Because VA loans are limited to primarily residential
3 properties, any possibility of cash out for investment or
4 business purpose is excluded. 536 of those loans are FHA
5 loans and they have similar restrictions and we cite those to
6 more than 55 percent of the loans by definition and by
7 guidelines done by the VA and the FHA are precluded from
8 having the exempted purposes. Applying those statistics that
9 we cite in our brief to the remaining loans, there's only
10 about 178 Eagle class loans that would be expected to have
11 cash out refinances. The loan documents that the defendants
12 have would show which ones were cash out refinances and an
13 inquiry of that nature does not predominate the common issues
14 found in here.

15 Boils down further, Your Honor, the Defendant's
16 Uniform Residential loan application would provide additional
17 guidance as to the purposes of any cashout as we see in Ms.
18 Clark's HUD-1 -- or in her both HUD-1 and her application that
19 was paid off, consumer debt.

20 With respect to their argument with respect to the
21 time frame of the class, Jay Zukerberg testified in his
22 deposition that he had kickback agreements and paid Eagle
23 branch managers or employees such as Gary Klopp beginning in
24 2007 or as early as 2007. The data from the Genuine Title's
25 processing software confirms this showing the 117 loans

1 assigned and referred to Genuine Title by Eagle in 2007.

2 There's no basis to amend the class definition at this point.

3 Today is not about the merits. The affidavits that
4 they referred to is before we found more evidence and before
5 Mr. Zuckerberg testified in his deposition in 2016. The
6 Plaintiffs anticipate that Zuckerberg will again confirm that
7 there were kickbacks in exchange for referrals the entire time
8 that these folks were at Eagle.

9 Your Honor, frankly this is a textbook case for
10 class certification. The common evidence is remarkable in
11 this case as I don't know if you read the opinion by Judge
12 Drott or Judge Bennett, but they remarked on how much common
13 evidence they were able to uncover. And the common facts here
14 make it clear that one case is obviously preferable to
15 managing up to 3,000 cases.

16 Mr. Maloney will talk about standing, but if you
17 have any questions for my portion of it, I'm happy to --

18 **THE COURT:** Okay, and it probably does make sense
19 for me to ask you my questions now and then we'll hear from
20 Mr. Maloney on standing. Let me start kind of where you left
21 off on the date issue. You refer to Mr. Zuckerberg admitting
22 to this scheme beginning as early as 2007. In his deposition
23 at page 17, line 10 he says it was 2009. Can you pinpoint for
24 me where this 2007 admission is located?

25 **MR. SMITH:** I'll see if I can find that, Your Honor.

1 I don't have his deposition. It's a little bit harder, I
2 don't have a trial notebook like I normally would.

3 **THE COURT:** Can you provide it maybe by a brief
4 letter filing after the hearing if no one finds it for you as
5 we go on?

6 **MR. SMITH:** Yes, absolutely.

7 **THE COURT:** All right. And then in Mr. Klopp's
8 deposition, are you arguing that he's saying kickbacks were
9 paid as early as 2006? Some of that context seems to be
10 missing, which makes it a bit difficult to decipher.

11 **MR. SMITH:** Your Honor, my recollection, I took Mr.
12 Klopp's deposition and my recollection is that the testimony
13 of either him or Jay Zukerberg was he actually began -- and
14 Mr. Klopp wasn't at Eagle at that time -- but he actually
15 began paying Mr. Klopp in 2005.

16 **THE COURT:** Okay, all right. And do you agree that
17 the scheme ended on January 31, 2011, when Eagle Nationwide
18 let go of all its employees?

19 **MR. SMITH:** Your Honor, my understanding is that
20 they retained some of their branches and I think discovery
21 would be necessary with respect to the affidavit that they
22 filed, but, you know, they certainly claim that they did, but
23 my understanding is Eagle retained some branches and whether
24 those branches were ones that the loans came from or not I
25 think would require further discovery.

1 **THE COURT:** Okay. All right, turning to some of the
2 Rule 23(a) questions, do you agree that the predominance
3 requirement in Rule 23(b) is more stringent than the
4 traditional commonality questions in Rule 23(a)?

5 **MR. SMITH:** Yes, Your Honor.

6 **THE COURT:** Do you believe a separate analysis of
7 commonality is still required?

8 **MR. SMITH:** Yes, commonality and predominance is
9 required and predominance is a stricter requirement than
10 commonality, yes, Your Honor.

11 **THE COURT:** Okay. And if the Court were to reach
12 the conclusion that certification is appropriate at this
13 point, do you agree that the Court would retain the authority
14 to decertify at a later date depending, again, on evidence
15 that might be developed through discovery?

16 **MR. SMITH:** Yes, Your Honor.

17 **THE COURT:** Okay. You made some arguments with
18 respect to the *Thorn* case and with respect to the fact that in
19 your view the fraudulent concealment questions are largely
20 uniform amongst the people, but do you agree that it will be
21 necessary for the Court at some point to probe individual
22 class members, media consumption and exposure to information
23 in order to assess the diligence component of fraudulent
24 concealment? Understanding your view that the concealment
25 part, the actions that were taken to conceal would be common

1 amongst the class members.

2 **MR. SMITH:** Your Honor, I think with respect to
3 satisfying the diligence requirement, that is, Your Honor, as
4 set out in *Edmondson*, what a reasonably diligent residential
5 borrower would be required to find. I think that is common
6 throughout the class and does not require an individual. And
7 letting the jury know what is common, which is, you know, if
8 you did a LexisNexis search like an attorney does or defense
9 counsel did in this case, this is what was out there on the
10 internet as of January the 23rd, 2015 or whatever date is
11 associated with that. I think the jury did evaluate that on a
12 class live basis as to the reasonable diligence. But with
13 respect to my proverbial needle in the hayfield analogy as to
14 actual notice, I think, you know, a lot of the items cited by
15 defense counsel are trade magazines or trade newspapers,
16 Mortgage Daily, Credit Union Times and stuff like that that
17 are not even available to consumers. But, you know, if we're
18 going to chase the needle in the hayfield, and I would submit
19 that the defendants could have taken -- we have all the
20 addresses and telephone numbers and information on these
21 borrowers. If they really thought that there was a punitive
22 class member out there that would have seen this stuff, there
23 could have been depositions taken to prove that this is not a
24 common issue, that nobody would have seen this stuff. They
25 could have taken those depositions. They chose to

1 strategically not. I think it is highly, highly, highly
2 unlikely that anybody ever saw any of this information. And
3 the diligence part can be done by common proof. But if the
4 Court said, you know, hey, even though that is the remotest of
5 remote possibilities, we've got to ask each one of these folks
6 whether they saw any of this material, then it could be done
7 by questionnaire or we could design something. And it may be
8 prudent to ask the jury in a common way even if they would
9 have seen this would it have meant anything on your own issue
10 of diligence. Because the information never -- none of the
11 information that they cite cites Eagle, except for the Pacer
12 stuff and I can't imagine anybody signing up to subscribe to
13 search on Pacer. So I don't know if that answers your
14 question, but I was trying to.

15 **THE COURT:** It does, thank you. Okay, I don't think
16 I have any more questions for you. Before I hear from Mr.
17 Maloney, though, you raised a good point. It does make sense
18 for me to put on the record whether is Ms. Edmondson on the
19 line?

20 **MS. EDMONDSON:** Good morning, Your Honor. Yes, I am
21 on the line.

22 **THE COURT:** All right, good morning, Ms. Edmondson.
23 And Ms. Clark, do we have you on the line?

24 **MR. SMITH:** She works at Johns Hopkins and I know
25 that --

1 **THE COURT:** Okay, you mentioned that. I just wanted
2 to make clear for the record who we had on the line as
3 representative.

4 All right, then Mr. Maloney, we're happy to hear
5 from you on standing.

6 **MR. MALONEY:** I've now been unmuted, thank you, Your
7 Honor. I'll begin with what the approach should be for the
8 Court on standing and we believe that the case law is quite
9 clear that the Court should take the class certification
10 approach. This was described in great detail by Judge Hazel
11 last October in the Williams versus Potomac Family Dining
12 case. And he surveyed the case law on this and said that he
13 found that two other district courts in the Fourth Circuit
14 have adopted this approach. It appears no other district
15 courts have adopted any other approach and this appears to be
16 the overwhelming approach in other circuits and other federal
17 courts.

18 In 2015 the Ninth Circuit did somewhat of a survey
19 in the Melendres case and they found that it was the
20 overwhelming approach adopted in most federal courts
21 throughout the United States. We have found that it's been
22 adopted in the Second Circuit, the Third Circuit, the Fifth
23 Circuit, the Sixth Circuit, the Ninth, Tenth and Eleventh
24 Circuits. We have found no circuit that has not adopted that
25 approach.

1 As Judge Hazel pointed out that under the class
2 certification approach, once the main plaintiff demonstrates
3 her individual standing to bring a claim, the standing inquiry
4 at that point is concluded and the Court then proceeds to
5 consider whether the Rule 23(a) prerequisites for class
6 certification have been met. As the Tenth Circuit says, there
7 are practical reasons why you go in this direction. Standing
8 is a threshold issue at this point only for the class
9 representatives and that at that point, the courts should
10 proceed to address the Rule 23(a) considerations about the
11 relationship between the class representative and the members
12 of the class.

13 As the District Court in West Virginia observed in
14 the Hendrick case in 2017, once the main litigants have
15 established standing, this conclusion does not automatically
16 establish that they meet the Rule 23 standards, but it does
17 shift the focus of the examination from the elements of
18 justiciability to the ability of the main plaintiff to fairly
19 and adequately protect the interests of the class under the
20 Rule 23 factors that Mr. Smith has just outlined and discussed
21 in detail.

22 With respect to the particular standing in this
23 case, I should note for the record that standing was not
24 raised initially in a 12(b) (6) or 12(b) (1) motion. It was not
25 raised at any time during the lengthy appeal of this case in

1 the Fourth Circuit and it was not raised until really the
2 opposition to the Motion for Class Certification had been
3 pending for some time.

4 I'd like to begin on the standing issue by
5 addressing Mary Edmondson's standing. As the Court heard just
6 a few moments ago, her loan was in August of 2010. It is not
7 in dispute that what Mr. Zuckerberg did at the end of that
8 month and in early September was he took off of each of the
9 loans for the previous month, a sum we believe was equal to
10 approximately or more than \$300. He used that money to pay a
11 kickback. He sent the kickback in the form of cash at that
12 point on September the 2nd. The source of that fund was
13 line 1100, the settlement services. What his practice was for
14 all of these was to bake in the 3 or \$400 kickback into the
15 settlement services that appeared on line 1100 of the HUD. He
16 then used those proceeds on a per loan basis each month to
17 provide the kickback which was in exchange for the referral.
18 There were no legitimate title services that were provided for
19 the amount of the kickback that was baked into the cost of the
20 settlement services.

21 The Defense has raised a report from Mr. Yerman that
22 suggests somehow that Ms. Edmondson paid below market rates.
23 We think that that actually -- that report actually shows the
24 opposite in terms of Ms. Edmondson and others which I'd like
25 to address now.

1 First of all, we should point out that Mr. Yerman's
2 report was incomplete. His opinions and methods do not meet
3 the requirements of Federal Rule 702. And additionally, this
4 should be subject to discovery cross-examination and other
5 review and litigation that would occur with an expert opinion
6 in the course of class certification litigation and not as
7 being shoehorned into an opposition to class certification for
8 the first time. And the scheduling order that the Court has
9 issued has provided for just that type of discovery. I would
10 point out that Mr. Yerman did not attach HUD-1s to his report
11 and we did. And what it showed was that Mr. Yerman had cherry
12 picked nine loans from really an undisclosed overall sample
13 presumably in the thousands or tens of thousands over his
14 30-year career. How they were selected is unclear. And then
15 when we look at the HUD-1s themselves, we find that a number
16 of those are not comparable in any way. Only four of the nine
17 loans chosen for comparison list a fee for title examination.
18 And title examination is the only settlement service that was
19 listed on Ms. Edmondson's HUD-1. Five of the HUD-1s -- the
20 other five HUD-1s that Mr. Yerman relies on do not list any
21 title examination at all. They're not comparable and they
22 should not consider. So we're now down from nine to four.

23 Additionally, of the cost to Ms. Edmondson, she is
24 charged an extraordinary amount for a title examination, \$440
25 and I will explain now why that is extraordinary. The first

1 two sample loans charged were \$295 for a title examination,
2 but Ms. Edmondson paid \$145 additional than that. And that is
3 something that under her particular circumstances was
4 extraordinary in this case given her particular history and
5 given the limited need for title services that she had in this
6 particular case.

7 We also would point out that the same issues hold
8 true with respect to the Clark and Neil loans, and we believe
9 that Ms. Clark's abstract charge stands out three times higher
10 than what Mr. Yerman's market rates and Ms. Neil's abstract is
11 four times higher than the market rates.

12 We also in looking at the bigger picture show that
13 these charges are in an environment here when we look at the
14 HUD listings for mean, medium charges state by state, Maryland
15 is already extremely high and we believe we can show that is
16 because of the prevalent practice of kickbacks that we've
17 demonstrated in this and other cases. But even when we look
18 at Maryland's high charges, Ms. Edmondson's \$440 charge is
19 35 percent above the Maryland average, 70 percent above the
20 state median and close to the top 80 percent in fees, which is
21 extraordinarily high and we believe violative of the
22 reasonableness guidelines that show that are in 24 Code of
23 Federal Regulation 203.

24 So put simply, we believe any assertion that Ms.
25 Edmondson paid below market rates are belied by the evidence

1 and it actually shows the opposite, that she paid much higher
2 market rates here based upon the circumstances and based upon
3 what happened here.

4 I want to point out that particularly in Ms.
5 Edmondson's case, this is extraordinarily true because her
6 2010 refinance came only one year after a 2009 refinance. So
7 because it only required one year of a title search as opposed
8 to a typical title search that may go back decades, and this
9 was only a low cost refi for a condominium, the idea that that
10 kind of one-year title search after a 2009 refinance should
11 yield that kind of title examination is very strong evidence
12 in itself that she was excessively titled. And then when we
13 couple that together with Mr. Zuckerberg's admission that baked
14 into each one of these that the source of his funding for
15 kickbacks was these proceeds here and that as he said on
16 page 70 of his deposition that if he didn't have to do it he
17 would have willingly given the funds back or remitted them to
18 the borrowers, but he felt he had to do it to compete. I
19 think we have strong, strong evidence of actual harm and
20 injury. In fact, overwhelming evidence really and that we
21 compare this to the *Baehr* case recently issued by the Fourth
22 Circuit where the plaintiffs there didn't allege that they
23 had, in fact, any particular overcharging or that they paid
24 more. Instead they made a nebulous claim that they were
25 denied the benefits of market competition, that they were not

1 prepared to quantify with any specific or concrete injuries.
2 So we believe that the standing evidence is strong and
3 particularized here. We believe that Mr. Zuckerberg's evidence
4 is strong evidence of this as well and we believe that in this
5 particular case, the pattern and practice was overwhelming
6 which was to take funds in every case and not just Ms.
7 Edmondson's, write off the line 1100 at the end of the month
8 and remit it as a kickback from the borrower. The charge is
9 not for title services and to do it in exchange for a referral
10 in clear violation of RESPA.

11 I want to address the issues involving Chemene
12 Clark. As the Court knows, the case was filed on behalf of
13 Chemene Clark and Janet Clark. Janet Clark has now been
14 diagnosed with severe aphasia resulting from a stroke and
15 cannot testify. And we do not believe she can any longer
16 fulfill the role of a class 23 representative. And so she's
17 been withdrawn as a proposed class representative.

18 The Defense has moved to in their objection to class
19 certification, is now alleging that Chemene Clark lacks
20 standing because she went through a Chapter 7 bankruptcy in
21 2012, years before she was aware of any RESPA claim against
22 any of these particular defendants. I want to point out that
23 this issue was never raised prior to the opposition to class
24 certification. The defense was aware of this as recently as
25 January -- or as long ago as January the 10th, 2020. Based

1 upon the Pacer receipt for her bankruptcy docket we had
2 interrogatories and initial disclosures where these issues
3 should have been raised, but the defense remained silent until
4 filing its opposition for class certification.

5 We want to tell the Court and we've said this in our
6 pleadings, that Ms. Clark was entitled to reopen her
7 bankruptcy estate so that she could continue to enjoy her
8 claim as a class representative. And by doing that, she would
9 petition to apply the remaining \$1,700 in bankruptcy setoffs
10 and request the bankruptcy trustee to abandon any claim for
11 the remaining value of the RESPA claims. Once the defense
12 learned that Ms. Clark would do this and had retained
13 bankruptcy counsel for this purpose, they intervened and
14 separately and privately made an offer to the bankruptcy
15 trustee to settle Mrs. Clark's claim for more than the claim's
16 value. And the trustee then moved for approval of the
17 settlement offer. Ms. Clark has objected stating that the
18 offer is not a good faith settlement, but instead is being
19 made for the purpose of defeating her class action standing in
20 this case and an inexpensive way for the defense to attempt to
21 escape liability for the more than 3,400 RESPA claims in this
22 class. So while that motion which is now pending and has not
23 been ruled on and as long as it is pending her standing is not
24 extinguished.

25 In the meantime, Mary Edmondson is more than capable

1 of representing the Eagle's class. Additionally, we would
2 point out that the Fourth Circuit has a liberal policy in
3 favor of substitution of class representatives and that
4 district courts have routinely allowed the substitution of new
5 class representatives after the original representative has
6 been disqualified. In view of the circumstances of this case,
7 particularly in view of the fact that Janet Clark now suffers
8 from aphasia and that we don't know what's going to happen
9 with Ms. Clark's motion before the trustee, should she be
10 disqualified, we would request the Court leave to put in a --
11 to substitute a new class member, Ms. Neil. She meets all of
12 the qualifications to be a named plaintiff. She's never filed
13 for bankruptcy. Her claim is identical to all the other Eagle
14 members' claims and we would request that in the event that
15 Ms. Clark could no longer continue.

16 Your Honor, there are other things I can say about
17 Mr. Yerman, but at this point I'll wrap up the standing issue.
18 If the Court has any questions, I'll be happy to answer them.

19 **THE COURT:** Okay, thank you. That was very
20 comprehensive, so I just have a couple to make sure that I
21 understand your position. So you are only raising Ms. Neil as
22 a substitute in the event that Ms. Clark does not prevail in
23 her appeal in the bankruptcy?

24 **MR. MALONEY:** That's correct. We'd like to proceed
25 with Ms. Clark, but if for some reason her motion and her

1 objection is not sustained and the bankruptcy proceedings
2 prevent her from proceeding, we would make a formal request to
3 the Court to substitute Ms. Neil.

4 **THE COURT:** And in theory if Ms. Edmondson were
5 determined to have standing to pursue her claim though, you
6 would prefer to make sure you have two, but presumably we
7 could proceed simply with Ms. Edmondson if she were found to
8 have standing?

9 **MR. MALONEY:** That's correct, Your Honor. We could
10 proceed with just Ms. Edmondson, but things happen in life as
11 we saw from the other Ms. Clark and we certainly want to be in
12 a position to have at least two, and perhaps three.

13 **THE COURT:** Okay. All right, I think I understand
14 your position and I think I'm ready at this point to hear from
15 the Defendants.

16 **MR. BECKER:** Good morning, Your Honor. And may it
17 please the Court, let me just first start by giving a broad
18 intro to where we're going and then we'll get into the
19 details. I think I'll start with standing even though Mr.
20 Smith admitted remarkably that there's no question that an
21 individual inquiry would have to be done related to the notice
22 issues, but I will get to that.

23 The bottom line is that Plaintiffs have not and
24 cannot meet their burden that a class can be certified here
25 for two reasons, though either one in and of itself is enough

1 to deny the motion. First, neither of the two proposed class
2 representatives actually before the Court have standing,
3 Chemene Clark and Mary Edmondson. And without standing,
4 individual standing, they cannot meet this constitutional
5 threshold requirement and their individual claim must fail
6 alongside the class claims.

7 Chemene Clark's claim does not belong to her. It is
8 the property of the bankruptcy estate and therefore,
9 controlled by the estate. Plaintiffs don't even dispute that.
10 The bankruptcy filing precludes her from pursuing that claim.

11 Mary Edmondson lacks standing because the
12 uncontested evidence of record before the Court shows that
13 she paid below market value for the title services she
14 complains of. And under the Fourth Circuit's recent decision
15 in *Baehr*, this failure means Edmondson lacked the type of
16 concrete particularized harm required to proceed. Plaintiffs'
17 improper eleventh-hour request to substitute in a brand new
18 class plaintiff identified just last week, not properly before
19 the Court. Moreover, it's a remedy the Court has already
20 granted last December so that the Plaintiffs could add two
21 proposed class plaintiffs, which neither one of which are able
22 to serve the class representative, either of the Clarks.

23 But even if the Court could get past the
24 insurmountable standing hurdles shackling each of the proposed
25 class plaintiffs, the class still couldn't be certified

1 because the individualized issues related to the statute of
2 limitations which Mr. Smith admitted to in his argument, as
3 well as identification of class member issues that were raised
4 after *Baehr*, those overwhelm the common question such that
5 there is no way to get a class certified here.

6 There was a lot of publicly available information
7 relating to this exact supposed scheme out there and detailing
8 the very two brokers who worked with these proposed class
9 representatives. And according to Plaintiffs, more than
10 three-quarters of the entire class that was out in the public
11 domain for years before the lawsuit was filed and class
12 members exposed to that information were either on actual or
13 inquiry notice of their claims which triggered their own
14 statute of limitations. And the only way to determine that is
15 through individualized mini-trials to decide who knew what and
16 when.

17 Further, *Baehr* recently decided by the Fourth
18 Circuit makes clear that to pursue a civil RESPA claim, there
19 has to be an overcharge, proof that the title fees complained
20 of were unnecessarily increased and individualized issues
21 predominate as to who could even be in a RESPA class and how
22 the class can be identified. Plaintiffs' theory is just that
23 a kickback equals an overcharge so that the class is simply
24 all borrowers from Genuine Title. It never made sense in
25 light of the evidence in this case. Indeed, as we point out

1 in our papers, the testimony of Genuine Title's president
2 rejected that, but now it definitely is not viable after
3 *Baehr*. Plaintiffs have not proffered any way to identify on a
4 class-wide basis, who is in the class and actually had an
5 overcharge or their title services unnecessarily increased
6 because of a RESPA issue. This isn't like a consumer false
7 labeling class where everybody paid the same thing for a jar
8 of falsely advertised tomato sauce. Here everybody paid
9 different title fees and the only way to discern the
10 overcharge is to do an in-depth analysis of the title charges
11 and the Plaintiffs proffer no way to actually do that and
12 that's their burden, not ours.

13 Turning first to the individual standing issue and
14 let me start with Chemene Clark. In light of the standing
15 arguments Defendants made in the opposition, they appear to
16 abandon Clark because that's what they did in their papers.
17 Today they seem to be hedging taking a little bit of a
18 different path. But either way, the answer is still the same.

19 Janet Clark was originally proposed as a class
20 plaintiff in December, but then almost immediately withdrawn
21 by Plaintiffs because she had severe medical issues which they
22 recognized could not mean that she could serve as a class
23 representative. That didn't just happen. That's been that
24 way for a while. So that's incorrect, which is what Mr.
25 Maloney said. But now rather than offer any real defense of

1 the selection of Chemene Clark, they want to improperly sub in
2 Ms. Neil. But focusing on Clark, they offer no legal argument
3 whatsoever as to why Clark has standing to pursue her claim in
4 light of the bankruptcy, nor could they because the law
5 Defendants' cited in the opposition brief which is page 15 and
6 16 is clear that since Clark filed for bankruptcy in 2012, any
7 claim she had in this case belonged to the bankruptcy estate
8 and not to her personally. And this is true regardless of
9 whether Clark knew about that at the time she filed the
10 bankruptcy petition in 2012. Clark filed her bankruptcy after
11 her loan closed and before she filed this case not listing the
12 claim as an asset. And she got a discharge in 2013. Now in
13 an exquisite confession that is the bankruptcy estate and not
14 Clark that has standing to pursue the claim, in late
15 March 2020 Clark filed a motion to reopen the bankruptcy
16 proceedings in order to schedule this claim. Now the trustee
17 did not abandon the claim, nor was he required to, Plaintiff
18 seems to suggest, and instead moved the Bankruptcy Court for
19 the approval of a settlement that in his judgment is fair and
20 in the best interest of the creditors. That motion is
21 properly before the Bankruptcy Court and its merits do not
22 matter here. As such, Clark has no standing and not only
23 can't she serve as a class -- she can't serve as a class
24 representative, her claim must also be dismissed.

25 The Plaintiff's conclusionary statement that Mr.

1 Maloney just reiterated from their brief that while the motion
2 remains pending before the Bankruptcy Court is wrong as a
3 matter of law. That conclusion when they put it in the brief
4 was unsupported by any legal citations to authority because
5 it's plainly contrary to the law that Defendants pointed out
6 in detail in our opposition.

7 The Plaintiffs now try to cast aspersions about the
8 nature of the settlement with the trustees, but the bottom
9 line is that Clark has no rights whatsoever to this claim.
10 It's the bankruptcy trustee, an attorney named Charles
11 Goldstein, who has the sole authority as the proper
12 representative of the estate to make all decisions related to
13 the claim. That was the only person that Defendants could
14 discuss the claim with. And this isn't an attempt to pick off
15 a class representative because Clark never had standing to
16 bring the claim in the first place. He's not even a proper
17 party in the case. And anything that happened as a result of
18 her own actions in filing the bankruptcy is not anything
19 Defendants did.

20 And finally, the notion that Defendants should have
21 informed Clark's own counsel of the fact that their own client
22 filed for bankruptcy by updating their discovery response is
23 just absurd on its face, Your Honor. Defendants have no
24 obligation to provide discovery on matters equally available
25 to the Plaintiff or that are discoverable through a search of

1 public records or frankly, a conversation with their own
2 client which apparently never happened. Plaintiffs are simply
3 scrambling to cover up their own failures to do a proper and
4 adequate investigation before filing a complaint on her
5 behalf.

6 With respect to Ms. Edmondson's standing, she lacks
7 standing because she paid below market rate for the title fees
8 at issue. Now since the Defendant filed their opposition in
9 February, the Fourth Circuit decides in *Baehr vs. The Creig*
10 *Northrop Team* case and determined Defendants' position that an
11 unnecessary increase in title services fees is required to
12 pursue a claim into the law of this circuit. The Fourth
13 Circuit analysis in *Baehr* provides the Court a roadmap to
14 confirm Edmondson has no standing. Like here, *Baehr* was a
15 RESPA case where the Court was faced with allegations that
16 payment of marketing services in exchange for real estate
17 closing business referrals. There the plaintiffs paid
18 discretionary title fees of \$425. The Court split out the
19 discretionary title fees from the rate filed title insurance
20 fees where there's not discretion. The Court also referenced
21 that plaintiffs there paid, quote, "similar discretionary fees
22 of \$520 for a prior home purchase." *Baehr* explains that a
23 statutory violation divorced from any concrete particularized
24 harm that hurts the Plaintiff in a personal way is not enough
25 to give her standing.

1 So for civil liability under RESPA, the Plaintiff
2 must prove that there was an overcharge. *Baehr* says, quote,
3 "recognizing that a violation of RESPA does not always result
4 in a type of harm that Congress sought to prevent is not to
5 say that kickbacks that do not cause overcharge are insulated
6 from liability under RESPA." And the Court went on to explain
7 that the remedy in that situation is criminal penalties or
8 Government enforcement actions and the latter of which
9 actually occurred in this case. The Court in *Baehr* held that
10 \$425 paid in discretionary title fees was reasonable and they
11 said that they do not discern from *Baehr's* emphasis on the
12 payment for settlement services any harm other than the
13 Defendant's purported RESPA violation. The Baehrs received
14 settlement services for which they paid a reasonable rate
15 regardless of whether that payment was thereafter repackaged
16 as a kickback. The exact same thing can be said here.

17 So when the facts of this case and the record before
18 the Court are viewed through the lens of *Baehr*, the conclusion
19 should be the same here. Edmondson lacks standing. She paid
20 nearly an identical amount in discretionary title fees as did
21 *Baehr* -- as the Baehrs did. \$425 versus \$440. And the
22 conclusion that those fees were reasonable is supported by
23 three pieces of evidence submitted by Defendants. By
24 contrast, Plaintiffs have offered no actual evidence to
25 dispute this. There's the expert report first of Bill Yerman.

1 In November, Defendants served on Plaintiff the expert report
2 of Mr. Yerman who is a title services professional with
3 30 years of experience in this industry here and in Maryland
4 and nationwide. Mr. Yerman analyzed the title fees that
5 Edmondson paid, and based on his 30 years of experience which
6 included running a title company headquartered in Baltimore at
7 the time this loan was made, concluded to a reasonable degree
8 of professional certainty that her title fees at issue were
9 well below the market rate charged at that time by other title
10 companies. Yerman also concluded that based on his extensive
11 experience in the industry, Edmondson was not overcharged.
12 That is also consistent with the testimony of Jay Zukerberg
13 that we point out in Exhibits 38 and 39 of our opposition. He
14 was deposed twice, two different times, each time testifying
15 that he did not change what he charged his customers based on
16 the existence of any kickbacks. The notion that Mr. Maloney
17 and Mr. Smith said that a kickback was based into every
18 settlement fee is not supported by the record. It's not there
19 because it's not true. His charges were the same and then
20 what changed was how much Genuine Title would make on a given
21 loan if there was a kickback. He specifically stated under
22 oath he was not passing on the kickbacks to the borrowers. He
23 wasn't increasing their title fees. He also added that JM
24 Title's rates were competitive with the other title companies
25 for those fees and they were not overpricing because of any

1 kickbacks.

2 The third piece of evidence confirming that Ms.
3 Edmondson lacks standing is what was in her good faith
4 estimate. Prior to a loan closing, borrowers get a good faith
5 estimate of what the fees are going to be in connection with
6 closing of their loan. Here Edmondson received a good faith
7 estimate of her total title charges, but the GFE did not come
8 from Genuine Title. It was from another title company that
9 has never been accused of any wrongdoing. So it offers an
10 additional data point on what a market rate was for the title
11 services on a loan like Edmondson's. The GFE set the title
12 services there at \$1,003.50. So ultimately by using Genuine
13 Title, Edmondson actually paid less than what she would have
14 if she went with the title company chosen in the GFE.

15 So what Plaintiffs do is they resort to an attack on
16 Yerman's conclusion, but they don't offer any evidence of
17 their own to rebut them. And the notion that there should
18 have been discovery with respect to the Yerman report as Mr.
19 Maloney raised, they had the Yerman report in the beginning of
20 November. There was months of discovery still in the class
21 certification phase left to be done, but the Plaintiffs chose
22 to do nothing. They never even deposed Yerman. And their
23 attack on his conclusions are misguided for a number of
24 reasons.

25 First, his conclusions were based on his 30 years of

1 experience. He's seen thousands and thousands of loans in his
2 career, so he knows what title fees are reasonable. The
3 HUD-1s he selected were similar to Edmondson's transaction.
4 It was a refinance deal from the same time, general time frame
5 and geographic market as Edmondson's loan. That's the
6 universe he was looking at. And that review of those HUD-1s
7 simply confirmed his own conclusions that Edmondson's
8 discretionary title fees were below market rates.

9 Second, Plaintiff's desire to go HUD-1 by HUD-1 and
10 engage in an analysis of the specific types of fees paid to
11 parse out whether there was an overcharge, shows the type of
12 individualized inquiry that's needed here to determine who can
13 actually be in the class. *Baehr* makes clear that increased
14 fees resulting from the alleged kickbacks are a prerequisite
15 to pursue recovery and they've not proffered any objectively
16 reasonable way to identify appropriate class members on that
17 basis, because their operating theory is that as long ago it
18 was Genuine Title, it must have been a kickback and it must
19 have been within the class. But that theory is no longer
20 viable because as I said, it contradicts what Zuckerberg
21 testified to, but it also is no longer viable after *Baehr*.
22 Edmondson herself is actually a prime example of that because
23 she had not one loan in the class period, but two loans. Mr.
24 Maloney referenced her prior loan. What he didn't say was she
25 paid \$175 for title fees on that first loan. That loan by

1 their class definition is in this class. So that shows surely
2 there are other loans in this class where they concede there's
3 no overcharge on the first loan, so there's no way to prove
4 that there was an overcharge on a class-wide basis.

5 Finally, their analysis as to the individual HUD-1
6 title charges is also deeply flawed. To rebut a Plaintiff --
7 excuse me, to rebut Mr. Yerman's expert opinion which is
8 relied on 30 years of experience, the Plaintiff also really --
9 and Mr. Maloney gave it away in his remarks. He said we think,
10 we think the report is suspect. The issue isn't what they
11 think, it's what they can prove. And they have offered
12 nothing to prove that Mr. Yerman was incorrect. The only
13 thing even approaching any authority offered is this supposed
14 March 2010 chart which they say is from HUD, which is a
15 two-page submission with no indication of where it's from, has
16 unexplained handwriting all over it and no context about what
17 the purpose of the chart was or how it was put together. It's
18 hardly evidence of anything. And let me tell you, we have
19 searched the internet far and wide. We can't find this
20 anywhere. There's a reason that courts require citations for
21 authority. I have no idea where it's from or from what larger
22 continuum it might have been a part of, but I'd sure like to
23 see it. But even if the Court were to lend any credence to
24 that study, if you can call it that, Defendants point out an
25 actual authoritative HUD study from June 2012 that we gave you

1 the entire study, Your Honor to review, and it shows that
2 reading the tea leaves on the reasons there are variations in
3 title charges is an impossible task and therefore, it cannot
4 just be assumed as Plaintiffs would like this Court to do that
5 higher fees in a particular transaction are the result of an
6 overcharge, especially in light of all the other evidence to
7 the contrary. The bottom line is that Plaintiffs have nothing
8 to rebut Defendant's record of evidence that Edmondson charged
9 title fees were reasonable.

10 So with no overcharge to point to, the Plaintiffs
11 resort to trying to prove the particularized and concrete
12 injury *Baehr* requires a different way. They rely on the
13 March 2000 affidavit that they drafted for Zuckerberg, Your
14 Honor, but incredibly they still misrepresent what it says.
15 They claim it says a minimum of \$300 of the title and
16 settlement services on Ms. Edmondson's loans were split and
17 kicked back. Read the paragraph, Your Honor. That's not what
18 it says. All that paragraph says is that Zuckerberg was simply
19 explaining how the kickbacks worked in a general way. It
20 doesn't say anything about the customers or how they were
21 charged or that Edmondson's title fees were split. This is
22 just confirmation that the harm Edmondson is complaining of is
23 simply a recitation of the RESPA statutory violation which
24 *Baehr* specifically rejects as a viable legal theory.

25 Further, the affidavit is not inconsistent with what

1 Zukerberg's prior testimony was that customers were not
2 overcharged.

3 Second, Plaintiffs point to a contrived
4 hypothetical. They both, Mr. Smith and Maloney mentioned this
5 idea that Zukerberg testified and again, this is a quote, he
6 quote, "guesses" that if a broker asked him to give the
7 borrower some money back instead of paying kickbacks, he would
8 be happy to do it. This is exactly the type of hypothetical
9 conjured up injury that *Baehr* community rejects. It's
10 literally a hypothetical. But even if it were not a pure
11 hypothetical scenario, it doesn't shed any light on the only
12 questions that matter under *Baehr*. Is there an overcharge?
13 Here the answer is no. But if she's charged reasonable for
14 services she received, here the answer is yes. That ends the
15 inquiry.

16 Finally, Plaintiffs point to that previous refinance
17 transaction, but as I stated before, the 2009 loan is part of
18 the same class and she paid less which is an admission that
19 that loan, there was no overcharge which leads to the same
20 individuality problem which abounds in this case.

21 Now, their answer for the fact that neither of these
22 class representatives that they've chosen lack standing is
23 they want to have this eleventh-hour substitution of a new
24 person that they identified for the first time last week in a
25 reply brief. Their request isn't even properly before the

1 Court. It's well settled that Plaintiffs can't do the reply
2 brief to add an entirely new party to the case. There's no
3 motion for leave to amend, no amended complaint, and of course
4 no discovery whatsoever related to this individual. The cases
5 that Plaintiffs rely on to claim that the liberal substitution
6 is permitted do not aid their cause. They rely on cases where
7 the class had already been certified like *Cox* and *Chisolm*,
8 cases that did not even address the proposed class claim of
9 Article III standing, like Standard or International
10 Woodworkers, or cases where there was not a properly developed
11 record on the standing issues like International Woodworkers
12 in *Mcadam*. Plaintiffs often seriously rely on *Booth v. Prince*
13 *George's County of Maryland*, but that case definitively proves
14 the very point Defendants make. There, the Court held that
15 where a named plaintiff is dismissed for lack of standing and
16 the class has not been certified, the Class A claims must be
17 simultaneously dismissed because it's a constitutional issue.
18 In fact, there in *Booth*, the Court originally agreed to give
19 the plaintiffs 30 days to try to find a new class
20 representative to claim the standing problem, but the Court
21 issued a supplemental opinion saying that was wrong and they
22 relied on two Supreme Court cases. One was *Sosna v. Iowa*
23 saying that they should have just dismissed the claims because
24 when a class plaintiff, proposed class plaintiff has no
25 standing, there's no class certified, there is no class to

1 discuss. The remedy is dismissal.

2 This isn't even the first time Plaintiffs have
3 substituted in new proposed class reps in order to address the
4 prior standing concerns. The Court permitted the plaintiffs
5 to do that already in December allowing Chemene and Janet
6 Clark to come into the case. They've already had their chance
7 to solve Edmondson's standing problems which contrary to what
8 Mr. Maloney said that it wasn't raised until well after the
9 class certification opposition, that's just simply not true.
10 Defendants raised Edmondson's lack of standing back in July
11 when we answered the complaint. We specifically said she
12 lacks standing because she didn't pay marked rate -- she paid
13 below market rate for title services. So their solution is
14 equally deficient. These failures rest entirely with the
15 Plaintiffs. So for these reasons, Your Honor, neither Ms.
16 Clark or Ms. Edmondson have standing to pursue their claims
17 and their individual claims along with the class claims that
18 they tried to represent, by law, must fail.

19 Turning now, Your Honor -- I'm going to move, Your
20 Honor, to the individualized issues, the Rule 23. So let me
21 pause there and see if you want to break it up, ask questions
22 or if you'd like me to keep going or you'd like to ask
23 questions that are standing specific.

24 **THE COURT:** That's fine, I'm happy to ask a few
25 standing questions now. First, if I were to -- understanding

1 you disagree with this -- if I were to find that Ms. Edmondson
2 has standing to pursue her claims, you concede that all we
3 would need is one class representative for it to proceed
4 forward?

5 **MR. BECKER:** Yes, recognizing we think Ms. Edmondson
6 has no standing, yes, Your Honor. I would agree with that.

7 **THE COURT:** And you talked something about the *Baehr*
8 case, but that case seems to be different because in that case
9 the homeowner had acknowledged and explicitly stated that she
10 was not overcharged. Here there seems to be a factual dispute
11 between the parties as to whether there was an overcharge or
12 not. As we heard from Mr. Maloney, the Plaintiffs are
13 claiming that they paid significantly more than what was
14 warranted and you have Mr. Yerman's expert testimony
15 suggesting otherwise. Doesn't all of that kind of go to the
16 merits of the case rather than an initial standing issue in
17 class certification?

18 **MR. BECKER:** No, Your Honor. I think it has to be
19 decided now. Number one, as Your Honor well knows, if the
20 class certification lacks standing, while the merits do not
21 matter and the Plaintiffs' likelihood of success on the merits
22 do not matter, there is often times some merits adjudications
23 that need to be made or considered in connection with class
24 certification. *Baehr* also concluded that the title services
25 paid there were reasonable. *Baehr*, if you look at the

1 opinion, *Baehr* actually concluded that the \$440 paid was
2 reasonable, there was no overcharge. So that absolutely is
3 applicable to this case. So I don't think it's a little bit
4 different.

5 **THE COURT:** Well, except the homeowner there was
6 acknowledging that the homeowner did not believe she had been
7 overcharged. Here we have both an allegation of an overcharge
8 and a contention that the services that Ms. Edmondson received
9 were inadequate. In *Baehr* they seem to say the services were
10 adequate, but we were not overcharged, but we should have been
11 allowed the ability to enjoy competition with respect to our
12 services. So it seems to me to be a bit of a distinction on a
13 couple of points in terms of the precise allegations that the
14 Plaintiffs are making.

15 **MR. BECKER:** But we're well past the allegations
16 point, Your Honor. We're at class cert now where they've got
17 to prove that they do have standing. And that's a threshold
18 issue and they've offered no proof to show that there was an
19 overcharge. That's the crux of the issue, right? Defendants
20 have offered proof that there was no overcharge as I
21 explained, right? The Yerman report. The GFE. Zuckerberg's
22 own testimony. To rebut that and this is their burden,
23 they've offered nothing. So they can't just rely on
24 allegations and say this is what we think happened. We have
25 actually evidence hearing proof that they can't rebut and they

1 haven't.

2 **THE COURT:** Okay, all right. I understand your
3 point. Why don't you move on to the other issues.

4 **MR. BECKER:** Happy to, Your Honor. So moving on to
5 the fact that individualized issues relating to determine who
6 is actually in the class predominate and precludes class
7 certification here.

8 Repeatedly in Mr. Smith's argument he kept talking
9 about common questions, common questions, common questions.
10 But it doesn't matter what the common questions are. What
11 matters according to the Supreme Court in *Dukes* is are common
12 answers possible on a class-wide basis? And here the answer
13 is no. The analysis of Plaintiffs misses I think both the
14 point of the commonality and the predominance inquiry, as well
15 as the key questions that must concern the Court here.

16 What the Court should be focused on here is how all
17 of the publicity evidence in the public record beginning in
18 2012, namely *Baehr*, what happened here, impact the statute of
19 limitations analysis for individual class members. The impact
20 is significant. There was ample information in the public
21 record laying out the details of what happened and putting
22 anyone in the class who saw the information, on notice that
23 they had a potential claim related to their mortgage loan.
24 Even putting aside the fact that lawsuits were kicking around
25 this court going all the way back to 2012 in the *Roach* case

1 and then *Fangman* and a series of those cases that were going
2 through the courts in 2013, '14, '15 which lays out all of the
3 details about the scheme. There were these Government
4 enforcement actions that I alluded to earlier that resulted in
5 numerous press releases, extensive coverage in local and
6 national media outlets in 2015. You had a first wave in
7 January 2015. We point to the specific articles in our brief,
8 in our exhibits. Those are exhibits that -- the press
9 releases are 5 and 6. The articles are 7 to 13. These
10 articles, including ones in the Post and the Sun specifically
11 mention Genuine Title by name and made clear how this kickback
12 operation supposedly operated. Then a few months later you've
13 got another wave in April, 2015 CFPB and the Maryland AG were
14 at it again issuing more press releases outlining new
15 enforcement actions against Genuine and the individual brokers
16 who worked directly with the two proposed class members here,
17 Adam Mandelberg and Gary Klopp, as well as Angela Pobletts,
18 another broker that is implicated in this case as well. Those
19 press releases lay out in painstaking detail how the scheme
20 worked and how Klopp and Mandelberg were involved. The press
21 releases were also covered by various local and national
22 outlets. We put that in our brief as well. In May there was
23 more press because the CFPB and Maryland Attorney General
24 announced proposed settlements with Genuine Title and
25 Mandelberg and Klopp and others, and those were also covered

1 by local and national media outlets. We have a compendium of
2 those results at Exhibit 25.

3 So as Judge Bennett previously found, all of the
4 information about what happened here with Genuine Title and
5 these brokers and its precise contours were fully available by
6 mid-2015 at the absolute latest, more than 18 months before
7 the case was filed, in full view of any class members.

8 So with all the information out in the public for
9 years before it was filed, it begs the question of which class
10 members read, saw, or heard the news about Genuine and their
11 individual loan brokers and what they did in response to it.
12 That is the problem that prevents certification here. Class
13 members who are on actual or inquiry notice about their claims
14 more than a year before their case was filed are barred by
15 RESPA's one-year statute of limitations, you can't be in the
16 class. And the only way to make that determination is through
17 a class member by class member inquiry for a type of
18 individualized inquiry that the Fourth Circuit says precludes
19 certification. I think the Plaintiffs misapprehend the issue
20 to be decided along with our arguments as to why the statute
21 of limitations issue precludes certification. Because their
22 theory as laid out in their reply brief and expounded upon
23 today is that the only time that matters for purposes of class
24 certification is whether there was fraudulent concealment and
25 a lack of notice and diligence at the time of the loan

1 closing. And our argument and the real issue before the Court
2 is not what happened when the loan closed, but what happened
3 in the subsequent years as word of the scheme was broadcast
4 for everyone in the world and the class to see.

5 Plaintiffs' view is that once there was an original
6 concealment, the inquiry is over. But that's wrong as a
7 matter of law and that interpretation has staggering
8 consequences. What Plaintiffs fail to understand is once
9 there has been a fraudulent concealment, the statute of
10 limitations inquiry isn't voided for all time. The Fourth
11 Circuit in *Marlinton* which is Plaintiffs' favorite case, made
12 clear that the consequence of the concealment is that the
13 limitation period does not begin to run until the Plaintiff
14 discovers the fraud.

15 Another Fourth Circuit case relied on by Plaintiffs,
16 *GO Computer*, hammers this point home. Fraudulent concealment
17 doesn't stop the clock, it just moves the clock starting it
18 from when the wrong was discovered rather than when it was
19 committed.

20 So where that leaves us is even assuming there was
21 fraudulent concealment at the time of the loan, the clock
22 would still start for each proposed class member when they
23 knew or should have known that they could have had a claim.
24 Information that could have been amply supplied by press
25 releases and the intended news articles the Defendants have

1 shown were out in the public domain as Judge Bennett said, no
2 later than May 2015, 18 months before the case was filed.

3 Plaintiffs' theory is consistent with the way they
4 conducted the case which is just goaling out new class
5 plaintiffs by sending waves of solicitation letters whenever
6 it's convenient for them. They do it again on this motion
7 claiming that they have a new proposed class plaintiff ready
8 to go in light of the standing deficiency. The implications
9 of the Court signing off on that are profound because it turns
10 Plaintiffs' counsel, and not Congress, into the master of the
11 statute of limitations for RESPA claims. And Judge Bennett
12 previously expressed concern over that exact issue.

13 The Fourth Circuit's decision in *Thorn* is
14 instructive here. And the Court there denied certification
15 resolving the statute of limitations -- because resolving the
16 statute of limitations issues would depend on an examination
17 of the particular circumstances of each individual. There the
18 Court was faced with certification on a case involving
19 discriminatory insurance practices. And the position staked
20 out by the parties are similar. Defendants argued that
21 because individual class members could have been exposed to
22 sufficient information to give them actual or constructive
23 knowledge of discrimination, required individual hearings of
24 each class member to determine when and if they learned of the
25 information that would give rise to the claim. Plaintiffs

1 claim that the question could be resolved class-wide because
2 Defendants hadn't shown that any class member was exposed to
3 any of the information. This District Court denied
4 certification that was ultimately affirmed by the Fourth
5 Circuit. The reason for that was because there were numerous
6 sources of information available that could have alerted the
7 class members that there was a problem. And the Court, the
8 District Court said the Court cannot assume that none of the
9 members of the proposed class gained sufficient information to
10 put them on inquiry notice at some point which would result in
11 their claim being time barred.

12 The Fourth Circuit for its part held examination of
13 whether a particular plaintiff possessed sufficient
14 information such that he knew or should have known about his
15 cause of action would generally require individual examination
16 of testimony from each particular plaintiff to determine what
17 he knew and when he knew it. The Court went on to say, in
18 cases where the legal issue is focused on what the Plaintiffs
19 knew, it consistently held that individual hearings are
20 required.

21 The Fourth Circuit also made clear that the record
22 must affirmatively reveal that the resolution of the statute
23 of limitations defense on its merits may be accomplished on a
24 class-wide basis. Mr. Smith admitted that can't be done here.
25 He's talking about jury questionnaires or other things that

1 they can do to try and figure out what Plaintiffs knew and
2 when. That absolutely is impermissible under the law in the
3 Fourth Circuit. It's exactly the type of individualized
4 inquiry that requires denying class certification.

5 The *Thorn* Court also addressed how the issue plays
6 out in a fraudulent concealment context like the one we're
7 dealing with here. The Court there said, we cannot say that
8 the class members' unawareness of their cause of action is a
9 natural inference of the Defendant's concealment. And at any
10 rate, evidence of unawareness of the cause of action is
11 information uniquely in the class's possession, a fact that
12 defeats and necessitates of a presumption in the class's
13 favor.

14 The Court also stated that is reason to imply that
15 what it called the analogy context of equitable tolling,
16 specifically citing the *Marlinton* case and severing *Thorn*'s
17 applicability here. The fact that Plaintiffs now say that
18 *Thorn* has nothing to do with this case is curious because
19 first they forget that they affirmatively relied on *Thorn* in
20 their own motion admitting its applicability here. And
21 second, *Thorn* explicitly calls equitable tolling citing
22 *Marlinton* as the chief fraudulent concealment case in this
23 circuit as an analogous case. *Thorn* is directly on point here
24 and the Court's reasoning by any situation where there needs
25 to be an inquiry of what Plaintiffs knew and how that

1 knowledge impacts the statute of limitations.

2 What they're asking this Court to do is
3 impermissible under *Thorn*. It quite simply assumes that well,
4 there's just these articles and it was on A-12 and it was just
5 on these dates and it's likely -- Mr. Smith said likely that
6 nobody saw it. The Court, by Fourth Circuit law, cannot make
7 that assumption.

8 So in order to sort of pivot from the implications
9 of *Thorn*, Plaintiffs rely on what happened in *Edmondson*, the
10 Fourth Circuit opinion earlier in this case. But we need to
11 be clear about what *Edmondson* actually concluded in a
12 procedural context in which that went up to the Fourth
13 Circuit. It was a Motion to Dismiss and the Fourth Circuit
14 was bound to accept as true the allegations in the complaint
15 which the Fourth Circuit makes clear multiple times. The case
16 has nothing to do with class certification. True to form, the
17 word "certification" doesn't appear anywhere in the opinion.
18 *Edmondson* merely concluded that at the pleading stage where
19 the allegations in the complaint said Plaintiffs did not know
20 of their claims until they were alerted by a letter from their
21 lawyer, there was nothing in the record that *Edmondson* was on
22 inquiry notice. So it could not say as a matter of law on
23 that record that Plaintiffs failed to discover their claim.
24 That was only a determination as to name the Plaintiffs there,
25 Mary *Edmondson* for us, and of course didn't have any effect on

1 the class certification.

2 Edmondson also states generally whether Plaintiff
3 exercised due diligence in the face of public information
4 about a claim is a jury issue, a question of fact. And the
5 implication of that is that these types of individualized fact
6 determinations prevent class certification.

7 Plaintiffs also rely on *Fangman* and *Palombaro*, two
8 prior class certification cases that were decided in the
9 *Fangman* round of cases. But they're distinguished from this
10 case and offer no support. The Court there was never faced
11 with arguments against certification based on the widespread
12 notice of the claims available to the class for years before
13 the case was filed. That's because that ultimately led -- it
14 was those lines of cases that ultimately led to the publicity
15 and notice issues that preclude certification here. They were
16 also decided before the Fourth Circuit *Baehr* decisions, the
17 individualized issues resulting from that case. So the record
18 is very different from what those Courts decided such that
19 there is recently no connection between the two.

20 Plaintiffs also seek to avoid denials of the motion
21 on this idea that the Court should create a hypothetical
22 reasonable mortgage borrower and then adjudicate whether that
23 fictional borrower would have been on notice of the claims in
24 light of the publicity surrounding the case and the
25 enforcement actions.

1 First, that position ignores that *Thorn* rejected
2 that specific reasonable person scenario specifically in the
3 context of the situation where what counts is what the class
4 members knew and when they knew it. The Court clarified that
5 Defendants' argument, like here, is not that widespread
6 treatment of the issue provided a reasonable person with
7 sufficient information, instead what we're arguing is that the
8 actual class members were exposed to sufficient information to
9 give them actual or constructive notice. So *Thorn* says you
10 can't in that situation create this reasonable person, you
11 have to actually find out what the Plaintiffs knew.

12 The Plaintiffs' position also ignores the fact that
13 according to them there's more than 3,000 plaintiffs who could
14 have seen this information out there about their own loan
15 brokers who were involved in enforcement proceedings that
16 would have put them on actual or inquiry notice that they had
17 a claim. It also ignores the Fourth Circuit law from *GO*
18 *Computer* that says what's reasonable for each borrower depends
19 on which information was at hand for that particular borrower.
20 Each of these points goes to individualized inquiries. And
21 Edmondson is not to the contrary. Edmondson's passing
22 reference to a reasonable residential mortgage borrower even
23 mentions that this is a question of fact and the Court did not
24 have the benefit of the full evidentiary record this Court has
25 related to the publicity and briefing as to how that issue

1 pertains to class certification since it was on a Motion to
2 Dismiss. A reasonable residential mortgage borrower may make
3 sense when all of the plaintiffs are similarly situated such
4 that the answer to the notice question is capable of
5 class-wide determination. That is the case in *Edmondson* where
6 all of the main plaintiffs in the consolidated cases all said
7 the same thing. Because it was a Motion to Dismiss, the
8 Courts have to take the allegations as true and they all said
9 that none of them were aware of the fact that they had a claim
10 until they got a letter from the lawyer. In an instance like
11 that, the inquiry shifts to whether that position is
12 reasonable in light of the information at hand and whether it
13 was reasonable for them not to be on notice.

14 But here the situation is different. You have 3,000
15 plus plaintiffs, assuming Plaintiffs' numbers are right, and
16 they are not similarly situated. There's no dispute that
17 there was publicly available evidence out there for more than
18 18 months before this case was filed. But now we have no idea
19 what each plaintiff saw or when they saw it. And the only way
20 to know that is to ask them each individually. And that's why
21 *Thorn* controls, because it evaluated this precise issue in the
22 context of a class certification on a class certification
23 record and not on a Motion to Dismiss record where the Court
24 had no choice but to assume what the pleadings said. And
25 *Thorn* expressly rejects that.

1 The fact that individualized inquiries predominate
2 over common ones is also apparent from Plaintiffs' own prior
3 arguments to the Fourth Circuit, as well as the arguments made
4 in their reply on this motion. Plaintiffs previously told the
5 Fourth Circuit at oral argument that if you want to determine
6 what the Plaintiffs knew or should have known, you have to ask
7 them to find out. Ask them if they read the Baltimore Sun
8 specifically. That's a direct quote. That's as plain as an
9 admission that there is. And you can hear, we gave you the
10 link to the transcript, Your Honor. You can hear them say it.
11 This is directly an admission as there is that individualized
12 inquiries into the statute of limitation issues would
13 overwhelm the Commonwealth.

14 Plaintiffs also repeatedly in their presentation
15 today talks about, it's a jury question, it's a jury question.
16 If they said it once, they said it ten times, Your Honor. But
17 in that game, the Court's decision in *Minter* is very helpful
18 here. *Minter* was another RESPA case dealing with the statute
19 of limitations concerning class certification. And there
20 after originally certifying a timely class and a tolling
21 class, the Court decertified the tolling class because of
22 manageability concerns around the statute of limitations
23 defense. And the Court there said, quote, "the problem is not
24 that the circumstances of class members' transactions may
25 create a jury question, it is that it only creates that jury

1 question as to some class members and not others. Managing a
2 class action where some class members had a duty to inquire
3 while others do not, presents substantial logistical and
4 mental challenges for the Court and juries which warrant
5 decertification in its already complicated case." That is a
6 precise rejection of Plaintiffs' exact arguments here and the
7 Defendants should just take the issue to the jury.

8 Finally, Your Honor, these individual issues created
9 by the statute of limitations in *Baehr* are not even the only
10 ones that are problematic here. Individual issues predominate
11 also on whether the issue of these loans are even federally
12 related. RESPA has a number of enumerated exemptions that
13 would take the loan outside of this coverage. Things like
14 extensions of credit for business or commercial or
15 agricultural purposes. Example of that how this plays out,
16 Chemene Clark did a cashout refinance where she took money
17 from the transaction at issue. In those circumstances the
18 only way to determine if the loans are actually federally
19 related and subject to RESPA is to know what the funds were
20 actually used for. Defendants do not track how those proceeds
21 are used. And contrary to Plaintiffs' suggestion, the answer
22 is not going to be apparent from the HUD-1 or the loan
23 application unless the borrower knows how the money is spent.

24 The notion that Genuine Title's loan database can be
25 relied upon to provide accurate answers is incorrect.

1 Defendants know from their own review of the data that Genuine
2 Title, that much of it is not accurate and it has loans on
3 there that never actually closed. And Plaintiffs are well
4 aware of this because they faced this issue repeatedly in
5 other situations, the problems with the database. So we can't
6 just -- so relying on Genuine Title's database is not an
7 adequate answer here, nor is the notion that there would be a
8 claims process which violates the Defendants' due process
9 rights because we have no way to challenge the voracity of the
10 claim.

11 Either way you approach this, Your Honor, whether
12 it's as a standing issue or as an individual issue
13 predominating problem, the Class cannot be certified. Now I
14 will stop there, Your Honor, and see what questions you may
15 have.

16 **THE COURT:** Okay. Well, I do have a series of them.
17 First, when you referred to the *Thorn* case and kept relying on
18 the *Thorn* case and what should govern here, the facts of that
19 case are so different than what we're dealing with here. The
20 identified class had \$1.4 million people over multiple states
21 and a time period of over 60 years. Here we're dealing with
22 just a much narrower situation. We're talking about media
23 reports about some lawsuits and enforcement actions. So you'd
24 acknowledge at least that there are some significant
25 differences there?

1 **MR. BECKER:** I think there are differences in the
2 numbers, but I think the principle in *Thorn* remains the same.
3 The principle is still what Plaintiffs knew and when they knew
4 it. And that's what has to be discerned here in order to
5 certify a class. And I don't think the numbers make that any
6 different. There is information in the record that anyone
7 could have seen and that raises a question as to who saw it,
8 when they saw it, and what the impact is on this very statute
9 of limitations and whether they can be a member of the class.
10 And that can only be discerned through an individualized
11 inquiry.

12 **THE COURT:** Okay. I don't think there was much
13 discussion of numerosity today, although you were just
14 referring to the database to some extent. Does your side
15 concede that numerosity is not in question here?

16 **MR. BECKER:** Yes, Your Honor.

17 **THE COURT:** When you're talking about notice, would
18 there ever be a situation where there would not be a need for
19 individualized inquiry in class action? I mean, you know,
20 would equitable tolling in those types of cases, in your view
21 there would always be a need for individualized inquiry,
22 correct? And then in your view would we never be able to
23 certify a class?

24 **MR. BECKER:** No, Your Honor. I don't think that's
25 right. I think you look at *Fangman* and *Palombaro* and that

1 shows you where you can certify a class. I mean, at that time
2 the notice issues were not widespread. They weren't widely
3 reported. The issue was only in the sense of it coming up
4 through court filings. And I think the Court was concerned
5 well, most normal people don't have access to court filings so
6 it's not an issue there. But I think this is a very different
7 case. There are a lot of public press announcements and press
8 releases and media coverage laying out exactly what happened.
9 So that makes it a different situation.

10 **THE COURT:** And you acknowledge though that most of
11 that media coverage did not focus on Eagle?

12 **MR. BECKER:** Yes, but what it focused on was Genuine
13 Title which was involved in all of these transactions, but
14 more importantly it focused on the individual brokers that
15 were working with these proposed class representatives,
16 actually working with them on a daily basis to get their loan
17 closed, in Edmondson's case more than once, multiple loans
18 that she worked with Mr. Mandelberg on. So you're talking
19 about the actual individuals that these people were working
20 with, press saying these individuals have been involved
21 potentially in mortgage fraud. So I think that's an important
22 difference.

23 **THE COURT:** So in your view it turns on the
24 likelihood that class members would have had notice?

25 **MR. BECKER:** No, I think it turns on the idea if the

1 notice is available, we've got to find out what class members
2 knew and when and the only way you can do that is through
3 individualized --

4 (Court reporter was disconnected from the call at
5 11:42 a.m. and reconnected to the call at 11:44:32
6 a.m.)

7 **MR. SMITH:** --and it's whether the common issues
8 predominate regarding the main event or main element or
9 strongest element who were the individualized. The idea,
10 again, 87 percent of the folks are outside the state of
11 Maryland. The idea that somebody from Arizona would sign up
12 to receive press releases from Brian Frosh here in Maryland I
13 think is beyond unlikely.

14 With respect to the other aspects of the stuff, I
15 mean again, Mortgage Daily, Credit Union Times, I mean the
16 most, the most identifiable that regular residential borrowers
17 would see would be the Sun paper or the Washington Post. I
18 think they had something in there from China or something.
19 And that's just a LexisNexis newswire search. And so, you
20 know, most of these things don't matter whatsoever. And the
21 only one -- none of the citations that any of the media
22 coverage include Eagle. And only one that I'm aware of
23 included -- only one of the Sun Papers I think it was,
24 included the name Mandelberg and Klopp buried in it. And it
25 was not even an article as I recall. I think it was a blurb

1 on page 12a.

2 So, you know, I think the Court of Appeals in
3 *Edmondson* identified the reasonable residential mortgage
4 borrowers standard as the standard by which we judge
5 diligence. And that can be done on a common because the
6 defendant can put forward to the extent the Court allows, what
7 was out there. And again, this is five years after the latest
8 of the people that they would have had them check on the news
9 for five years straight, every single day. And it came out
10 not on a Sunday, not in the Sunday paper, it came out on a
11 Friday and a Thursday with respect to these. And the bulk of
12 that was relative to Wells Fargo and Chase and not individual
13 brokers. So that's what I have on the diligence issue.

14 With respect to the federally related just briefly,
15 Your Honor, yes we've had probably somewhere between 40 and
16 50,000 borrowers that we've had to deal with in the
17 settlement --

18 **THE COURT:** Counsel, I'm sorry to interrupt.

19 Apparently our court reporter got disconnected.

20 **THE COURT REPORTER:** I'm back on. I'm back on,
21 Judge. I got back on. You may continue. I did miss a little
22 bit. It cut me off. I got right back on and called, but it
23 took me a few minutes to get through.

24 **THE COURT:** Counsel, I'll defer to you, if you want
25 to back up a little bit, if you can recall what you said

1 roughly or whether you want to --

2 **MR. SMITH:** I don't remember where I was. The idea
3 that somebody five years after their settlement would be
4 combing the papers looking for bad acts by their lender and
5 never seeing their lender's name, and this idea, you know,
6 Adam Mandelberg managed a branch. Gary Klopp managed the
7 branch. The idea that the primary contact on a day in and day
8 out basis -- and Gary Klopp I know was a very large branch.
9 The idea that the personal conduct between the borrower and
10 the bank was the branch manager in each case I think belies
11 what the reality is. And only one of the what I would call
12 community-related residential borrower publications that it
13 would have appeared on -- and again, the jury is going to
14 decide whether the diligence requires them to be doing
15 searches for this. So you're only talking about somebody
16 consuming it in the ordinary course of business of reading
17 from page 1 through page whatever that the Sun Paper has. And
18 remember, the Sun Paper's subscription is only 2 percent of
19 Marylanders and we have 87 percent of the people outside the
20 state of Maryland. You know, I think it certainly doesn't
21 predominate the common issues.

22 Moving onto the federally related, you know, what
23 really happens in these issues, we can identify any ones that
24 are questioned. In fact, I've had to do it with Mr. Moffet.
25 He sends me six to eight loans out of it and we look at the

1 loan applications are there's maybe one or two of the people
2 we have to follow-up with. So this idea that there's the
3 exceptions for federally-related that are the Defendants'
4 burden are going to overwhelm the common issues I think belies
5 what the reality is.

6 And then just briefly on the overcharge, *Edmondson*
7 makes clear it specifically criticizes the failure of the
8 Defendants to itemize on the HUD-1 the referral fee. If they
9 had done what *Edmondson* said, Your Honor, we would
10 specifically be pointing to line 1110 of the HUD-1 where it
11 says referral fee \$300. And we'd say Judge, that is exactly
12 what Ms. Edmondson was overcharged. And it was paid on
13 September the 2nd, 2010. Because they don't do what *Edmondson*
14 says they have to do and victimize it on there and using Mr.
15 Maloney's term, baked into the title exam and not individually
16 itemize, that they want to say well now it's not -- we've got
17 to get into this comparison and it creates an individualized
18 issue. We know that \$300 for each settlement, a minimum of
19 \$300 for each settlement is being paid for the referral by
20 Adam Mandelberg. We know that from Jay Zukerberg. And so
21 therefore -- and we know from their actions from Mr. Yerman
22 that that as a volume discount, is typically passed on to the
23 borrower. And in this case it didn't go -- it went to the
24 branch manager at Eagle.

25 So with respect to that, with respect to just

1 briefly with respect to the bankruptcy, we filed the motion to
2 reopen. The council had conversations with the trustee's
3 office. There was only a little bit of difference between
4 what Ms. Clark really could get, not the \$5,000 that they
5 offered, what she really could get and what was already
6 exempt. They had given preliminary indications that they were
7 going to abandon the billing because little amount between the
8 two. And it wasn't until the defendants offered \$5,000 which
9 is more than -- because Mr. Clark is only entitled to half the
10 claim. That's more than what she would be entitled to under
11 the statute that the Bankruptcy Court -- bankruptcy trustee
12 changed its mind. But, you know, that's neither here nor
13 there. Ms. Edmondson has standing. And we know that had the
14 broker instead of taking or the broker or the branch manager,
15 had the broker or branch manager taken the discount or the
16 money and let it go to the borrower, we know from Mr.
17 Zuckerberg himself he would have been happy to give it to the
18 borrower instead of the branch manager, but that's just not
19 the way these branch managers were doing business back then.
20 And it was setting the market and it was doing exactly what
21 Congress sought to protect. It was unnecessarily increasing
22 the cost of settlement charges.

23 So unless Your Honor has additional questions.

24 **THE COURT:** No, thank you. That was helpful. Well
25 I appreciate everyone's presentations today. I am not going

1 to make a ruling right now. I will issue a written ruling as
2 soon as possible, but I appreciate all of your patience with
3 this format that is forced upon us and your participation
4 today. Is there anything else from either side that we need
5 to address?

6 **MR. SMITH:** Not from the Plaintiffs.

7 **MR. BECKER:** Not from Defendants, thank you.

8 **THE COURT:** Thank you all. Stay safe.

9 **(Proceeding concluded at 11:53 a.m.)**

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1 CERTIFICATE OF OFFICIAL REPORTER
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5 I, Nadine M. Gazic, Certified Realtime Reorter and
6 Registered Merit Reporter, in and for the United States
7 District Court for the District of Maryland, do hereby
8 certify, pursuant to 28 U.S.C. § 753, that the foregoing is a
9 true and correct transcript of the stenographically-reported
10 proceedings held in the above-entitled matter and that the
11 transcript page format is in conformance with the regulations
12 of the Judicial Conference of the United States.

13

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Dated this 26th day of October, 2020.

15

16

Nadine M. Gazic

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